

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR EUGENE CLARK,

Defendant-Appellant.

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UNPUBLISHED

August 18, 2011

No. 296779

Wayne Circuit Court

LC No. 08-019004-FC

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(1) (b), two counts of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b (second conviction). Defendant was sentenced to life in prison for the first-degree murder conviction, 31 to 50 years in prison for each count of second-degree murder as well as for the armed robbery conviction, four to seven years in prison for the felon in possession of a firearm conviction, and five years in prison for the felony-firearm conviction. We vacate defendant's convictions and sentences for two counts of second-degree murder but affirm defendant's convictions and sentences for first-degree murder, felon in possession of a firearm and felony-firearm.

Defendant first argues on appeal that his defense counsel was constitutionally ineffective for failing to investigate and present alibi evidence. We disagree.

Defendant moved for a new trial and the trial court held a *Ginther*<sup>1</sup> hearing on this issue and denied defendant's motion. Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004). The failure to fully investigate potentially exculpatory evidence may fall beneath an objectively reasonable standard of performance. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant argues that defense counsel was ineffective for failing to pursue or present evidence of an alibi. Defendant contends that counsel was informed of the alibi evidence prior to trial and that counsel admits that she was ineffective for failing to present the evidence at trial.

Defendant was convicted for the robbery and shooting death of Andre Cathey. His accomplice, Arnold Johnson, pleaded guilty and testified against him at trial. At the *Ginther* hearing, Brandee Patterson, defendant's girlfriend at the time, testified that she was with defendant on the night of the shooting. She testified that they rented a U-Haul truck and were together the entire weekend moving into a residence. According to Patterson, the night of the shooting defendant was with her when she went to sleep and when she woke up. Patterson also testified that \$10,000 that was found on defendant when he was arrested belonged to her. She further testified that she told counsel this information before defendant's trial and gave counsel a copy of her lease from that time. Patterson claimed she came to the trial expecting to testify but was not called as a witness.

Counsel testified that she did not file a notice of alibi before trial because she discussed calling Patterson with the prosecutor and he had no objections. She mentioned Patterson as a potential witness at the outset of voir dire, but was quoting the prosecutor's witness list. Counsel testified that she did not call Patterson to testify because on the day she planned to call her—the third of four days of trial—Patterson had left the courthouse. Counsel did not raise the issue of Patterson's absence with the trial court or request any accommodation for Patterson's schedule. She testified that Patterson was not difficult to reach. Patterson did not return to the courthouse until the following day, after the defense had rested, and counsel did not think that it was appropriate to request to reopen the proofs at that time. Counsel admitted this was a mistake.

The prosecutor cross-examined counsel about taped conversations between Patterson and defendant while defendant was in jail. She testified that there were conversations on the tapes about defendant having a sexual relationship with a Wayne County Sheriff's Deputy but she did not think that it was relevant to the case or that Patterson was particularly angry about the incident. She also acknowledged that Patterson and defendant spoke specifically about where they were at the time the shooting occurred. The phone calls were not entered into evidence.

As the trial court noted, there was no explanation given regarding why Patterson disappeared from the courthouse on the day she was expected to be called to testify. The court noted that there were "several inconsistencies" in the testimony at the hearing. The court concluded that "[o]nly . . . Patterson, the defendant and [counsel] know full well" why Patterson left the courthouse and counsel made no attempt to summon her. The court also stated, "[t]his may very well have been the desire of the defendant, if not defense counsel, obfuscating the

defense that [counsel] was going to present on behalf of [defendant].” The court concluded that there was no evidence that counsel had been ineffective.

The trial court’s conclusion rests on two findings of fact. First, Patterson’s unexpected absence from court meant that there was no credible evidence of an alibi for counsel to present. Otherwise, counsel’s failure to call Patterson as a witness would have clearly been ineffective assistance of counsel, as the court noted. And, the court also concluded that there was no clear evidence that counsel’s failure to call Patterson as an alibi witness was a mistake.

The court noted inconsistency in the testimony and made credibility determinations regarding the witnesses’ accounts of events surrounding the end of the trial and the failure to call Patterson to testify. Based on these findings, the court concluded that counsel’s performance did not fall beneath an objectively reasonable standard, as counsel and defendant contend.

Findings of fact are reviewed for clear error. *LeBlanc*, 465 Mich at 579. “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Our review of the record convinces us that there is no basis for concluding that the trial court clearly erred. Counsel knew of Patterson’s alleged ability to testify in support of an alibi defense up to two months prior to trial. Counsel did not file a notice of an alibi defense, nor list Patterson as a witness. Instead, counsel relied on the fact that the prosecutor listed Patterson as a potential witness. Counsel did not mention alibi in her opening statement or any other time at trial. She never mentioned calling Patterson as a witness at trial. She made no effort to obtain Patterson’s presence before the defense rested or seek assistance or accommodation from the trial court. Counsel and defendant contend that this is simply evidence of ineffective assistance. Counsel, however, testified that she has appeared as counsel on over 50 criminal jury trials. Yet her only explanation of why she failed to present an alibi witness in this case is that the trial court judge operates, “by the book.” Moreover, Patterson never gave any explanation why she left the trial right before counsel intended to present her as a witness.

There was ample evidence from which the trial court could conclude that counsel’s explanation for her alleged substandard performance was not credible. This Court defers to a trial court’s ability to determine the credibility of witnesses before it. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). The trial court did not clearly err when it concluded that there must have been a deliberate decision to not present an alibi defense, if such a defense existed. Further, the trial court was in the best position to assess Patterson’s testimony and conclude that she was not a credible alibi witness. Thus, the trial court did not err when it denied defendant’s motion for a new trial on this ground.

Defendant next argues that defense counsel was ineffective for failing to lay a proper foundation for the admission of extrinsic evidence of a prior inconsistent statement. We disagree.

A defendant must move for a new trial or request an evidentiary hearing to preserve an issue of ineffective assistance of counsel for appeal. *People v Rodriguez*, 251 Mich App 10, 38;

650 NW2d 96 (2002). Defendant did not raise this issue in his motion for a new trial, although it was addressed in counsel's testimony at the *Ginther* hearing. Review of this issue is limited to mistakes apparent on the record which, in this case, includes the testimony at the *Ginther* hearing. *Id.*

Counsel attempted to present testimony from a prison inmate regarding statements Johnson purportedly made to the witness in jail. Counsel argued the testimony was admissible under several hearsay exceptions. Counsel also suggested that the witness's testimony should be admitted for impeachment purposes. After the prosecutor noted that Johnson had not been asked about having a conversation with the witness, counsel explained that she did not do so because Johnson had denied knowing the witness.<sup>2</sup> The trial court excluded the testimony.

At the *Ginther* hearing, counsel testified that she "dropped the ball" by pursuing admission of the testimony as an exception to the rule against hearsay rather than as extrinsic evidence of a prior inconsistent statement under MRE 613(b). She further testified that she should have laid a better foundation for the admission of the testimony when she cross-examined Johnson. According to counsel, the inmate would have testified that Johnson told him defendant had nothing to do with the crime. But no testimonial record was made of the witness's proposed testimony at trial, MRE 103(b), and the witness did not testify at the *Ginther* hearing. Defendant also failed to present an affidavit from the witness.

Even if we were to conclude that counsel could have been more effective in laying a foundation for, and arguing the admissibility of the witness's testimony as a prior inconsistent statement under MRE 613(b), defendant's claim of ineffective assistance of counsel still fails. It is defendant's burden at the *Ginther* hearing to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). This includes establishing that the witness who was not permitted to testify would have provided evidence favorable to defendant to the extent that result of the trial must be considered unreliable. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994), holding that Pickens could not establish his claim of ineffective assistance on the basis of failing to call an alibi witness at trial because he failed to present the witness at a hearing on his motion for new trial. Thus, defendant, like Pickens, cannot show there was a reasonable probability that the missing evidence would undermine confidence in the outcome of the trial. *Id.*

Alternatively, counsel in her examination of the witness made the jury aware that he claimed to have talked to Johnson about the offense, and when asked by counsel what Johnson told him, the trial court sustained the prosecution's objection. The jury could have inferred that the witness's testimony would have been favorable to the defendant and reflected on Johnson's credibility. Because the jury convicted defendant on the strength of the substantive evidence that was admitted at trial, there is not a reasonable probability that the outcome of the trial would have been different had the witness been permitted to testify to the purported inconsistent statement of Johnson. *Solmonson*, 261 Mich App at 663-664.

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<sup>2</sup> When asked by counsel, Johnson actually testified that he did not recall ever being in the presence of a person with the last name of the witness.

Defendant next argues that his convictions and sentences for two counts of second-degree murder and one count of first-degree felony-murder violate his right against double jeopardy. We review this unpreserved issue for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). We agree with defendant and vacate his convictions and sentences for two counts of second-degree murder.

This Court held in *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000): “Multiple murder convictions arising from the death of a single victim violate double jeopardy. Thus, [a] defendant cannot properly be convicted of both first-degree murder and the lesser included offense of second-degree murder for the death of a single victim.” Accordingly, defendant’s convictions and sentences for second-degree murder must be vacated. *Id.*

We affirm defendant’s convictions and sentences for first-degree murder, felon in possession of a firearm, and felony-murder but vacate his convictions and sentences for two counts of second-degree murder. We remand to the trial court for the ministerial act of entering an amended judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Elizabeth L. Gleicher